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In the Supreme Court of the United States

OCTOBER TERM 1978

No. 78-334

78-334

KENNETH F. FARE,
Acting Chief Probation Officer,

Petitioner,

v.

MICHAEL C.,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

PETITIONER'S REPLY MEMORANDUM

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PRELIMINARY STATEMENT

Petitioner requests leave of Court to submit the following reply memorandum pursuant to Rule 24(4) of the Rules of the Supreme Court. This memorandum is submitted in reply to arguments raised in respondent's memorandum entitled "Reasons Why a Writ of Certiorari Should Not Be Granted."

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment V:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

ARGUMENT

I.

THE INSTANT CASE PRESENTS A SUBSTANTIAL FEDERAL QUESTION

Petitioner maintains that the instant decision of the California Supreme Court presents a substantial federal constitutional question which should be resolved in this Court. Respondent challenges this position and argues that the questions raised are merely academic and episodic, and further that it is based on the unique role of the probation officer in California and not on the Federal Constitution. Respondent asserts that during interrogation requests by suspects for the presence of persons other than attorneys occur very infrequently. Petitioner submits that this conclusion does not follow from what respondent characterizes as "only a handful of reported cases" on the subject. The vast majority of cases dealing with requests

for persons other than attorneys may never reach the appellate courts. Obviously in California the law now appears to be settled as to a minor's request for a parent or a probation officer, and such cases would be disposed of in the trial court. (*In re Michael C.* (1978) 21 Cal.3d 471 [146 Cal. Rptr. 358, 579 P.2d 7]; *People v. Burton* (1971) 6 Cal.3d 375 [99 Cal. Rptr. 1, 491 P.2d 793[.) Moreover, it is virtually impossible to speculate as to the effect a single decision such as *In re Michael C.* may have on police investigations. Presumably, where a minor asks for a probation officer in California, police now cease interrogation and an otherwise involuntary confession may never be obtained, let alone sought to be introduced into evidence.

Contrary to respondent's position that the issue is insignificant because so few cases have dealt with it, there appears to be a growing number of recent decisions involving requests for persons other than attorneys. In addition, the various states are in conflict as to how to apply the *Miranda* ruling to such requests. In California the rule is that a minor invokes his Fifth Amendment privileges if he asks for a parent (*People v. Burton, supra,* at p. 382), or if he asks for a probation officer. (*In re Michael C., supra,* at p. 473-478.) He does not, per se, invoke the Fifth Amendment if he asks for any responsible adult such as, for example, his clergyman. (*In re Michael C., supra,* at p. 477.) As respondent notes, other courts outside of California have dealt with the question of requests by minors for their parents and have ruled that such requests do not per se invoke the Fifth Amendment. (*See Chaney v. Wainwright* (5th Cir. 1977) 561 F.2d 1129, 1132; *State v. Young* (Kan. 1976) 220 Kan. 541, 555 [552 P.2d 905, 916]; *People v. Riley* (Ill. 1977) 49 Ill. App.3d 304 [364 N.E.2d 306], cert. den. (1978) 98 S.Ct. 1657.) However,

some states have held that consultation with a responsible adult is a prerequisite to a minor's waiver of his Fifth Amendment rights. (*See, e.g., State in Interest of Dino* (La. 1978) 359 So.2d 586, 592-594; *Commonwealth v. Jamison* (Pa. 1977) 474 Pa. 541 [379 A.2d 87, 87-89]; *Lewis v. State* (Ind. 1972) 259 Ind. 431 [288 N.E.2d 138, 142]; *Freeman v. Wilcox* (Ga. 1969) 119 Ga. App. 325 [167 S.E.2d 163, 166-167].) A majority of jurisdictions allow a minor to waive his Fifth Amendment rights without mature guidance and treat the waiver as a factual matter to be decided by the trier of fact in each case. (*See State in Interest of Dino, supra,* at p. 593, fn. 19, and discussion in *State v. Gullings* (Or. 1966) 244 Or. 173 [416 P.2d 311, 315].)

Thus, the instant issue is neither "episodic" nor "merely academic" but rather involves an important question under the Fifth Amendment, *i.e.*, whether the rule announced in *Miranda v. Arizona* excluding statements obtained where a suspect has been denied his request for the presence of counsel applies to denials of requests for persons who are incapable of providing the guiding hand of legal counsel. A minor is not, as a matter of law, incapable of making a voluntary confession. (See discussion in *In re Gault* (1967) 387 U.S. 1, 44-56.) Voluntariness in each case must be judged on the basis of the total circumstances including the minor's age and maturity. A minor who is sufficiently mature to voluntarily waive his right to remain silent could certainly benefit from the advice of counsel in the same manner as an adult suspect. However, the presence of a non-attorney so-called "responsible-adult" would not be able to provide the assistance contemplated by the *Miranda* court.

Respondent finds support for his position in the fact that this Court denied a petition for a writ of certiorari in *Riley*

v. Illinois, supra, (1978) 98 S.Ct. 1657. However, in *Riley* the state court had declined to expand the *Miranda* exclusionary rule and held that a minor did not invoke his *Miranda* rights when he asked to see his father during interrogation. The *Riley* court cited California's *People v. Burton*, but declined to follow it. (364 N.E.2d 306 at p. 309.) The Illinois rule is that there is no right to a parent or responsible adult present during interrogation. (*See People v. Pierre* (Ill. 1969) 114 Ill. App.2d 283 [252 N.E.2d 706, 710].) This Court's denial of a writ of certiorari in the *Riley* case was consistent with a policy of not extending the *Miranda* exclusionary rule beyond its original doctrinal moorings. (*See also, Michigan v. Mosley* (1975) 423 U.S. 96, 104-107; *Oregon v. Hass* (1975) 420 U.S. 714, 719; *Michigan v. Tucker* (1974) 417 U.S. 333, 446-452; *Harris v. New York* (1970) 401 U.S. 222, 225-226.)

It is clear that the instant decision of the California Supreme Court, and that court's decision in *People v. Burton*, are in conflict with the majority of states. It is also clear that there is a minority of states that have departed from the intent of the rule announced in *Miranda v. Arizona* and have done so based on their interpretation of the Federal Constitution. Petitioner submits that the instant case provides an opportunity to give guidance to the states as to the parameters of the *Miranda* exclusionary rule.

Respondent further argues that the instant decision is a narrow one because it emphasizes the role of the probation officer in California, rather than dealing with a factual situation that is likely to recur nationwide. On the contrary, the California Supreme Court's decision is based primarily on what Michael C.'s statements meant in the context of the Fifth Amendment, rather than on what

the probation officer's role would have actually been had the officer been present during interrogation. The court acknowledged that the probation officer is a peace officer and thus an arm of the prosecutorial system, but held that Michael C. did not view his probation officer as such when he made the request. From this reasoning, the California Supreme Court concluded that any minor making such a request per se invokes his Fifth Amendment rights. (*In re Michael C., supra,* at pp. 473-478.)

If probation officers in California were also attorneys and legally entitled to practice law, then one could conclude that the instant decision is unique and in fact is consistent with the rule announced in *Miranda*. However, probation officers in California have no such unique status, and what the California Supreme Court has done is extend that aspect of the *Miranda* rule that deals with requests for counsel to requests for someone other than counsel — someone who has none of the special qualities of counsel that this Court found important when it rendered its decision in *Miranda v. Arizona*.

II.
THE RULING OF THE CALIFORNIA SUPREME COURT WAS BASED EXCLUSIVELY ON FEDERAL CONSTITUTIONAL AUTHORITY

Petitioner submits that the instant case is a proper subject of review by this Court because the decision below was based exclusively on federal constitutional authority. The juvenile court order of wardship, which was based on the finding that respondent committed an act of murder, was reversed by the California Supreme Court on the ground that respondent's confession was obtained in violation of *Miranda v. Arizona* (1966) 384 U.S. 436, and the

Fifth Amendment to the Federal Constitution. In the petition for writ of certiorari, petitioner has asserted not only that there are no express references to state statutory or constitutional grounds in the decision below, but also that even the state cases cited by the California Supreme Court were interpretations solely of *Miranda* and the Federal Constitution. (Petn. pp. 15-16.)

Respondent nowhere controverts petitioner's assertion but claims, nevertheless, that this Court should not issue a writ of certiorari without first remanding the matter to the California Supreme Court to ascertain whether that court's decision was based independently on the California Constitution.

Petitioner notes that in *California v. Krivda* (1972) 409 U.S. 33 and *Ohio v. Gallagher* (1975) 425 U.S. 257, which respondent cites in support of remand for clarification, the state opinions under review contained express references to state law which could have been the basis for the state judgment.[1]

Similarly, in *State of Minnesota v. National Tea Company* (1940) 309 U.S. 551 and *Department of Mental Hygiene of California v. Kirchner* (1965) 380 U.S. 194, the uncertainty as to whether the state judgment was based on state law or the United States Constitution was clearly contained in language within the four corners

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[1] In *California v. Krivda, supra,* (1972) 409 U.S. 33, at 35, it was noted that the lower court opinion cited a state case which relied specifically on both state and federal constitutions.

In *Ohio v. Gallagher, supra,* (1975) 425 U.S. 257, the order of remand noted that the Ohio Supreme Court opinion framed the issue as a question of defendant's rights under the Ohio and United States Constitutions, and that the syllabus of the case could be interpreted as indicating that the ultimate decision was based on criminal law and evidence rather than on any federal constitutional consideration.

of the state judgment.[2] By contrast the decision of the California Supreme Court which petitioner seeks to be reviewed contains no reference whatsoever to state constitutional authority.

Notwithstanding the above, respondent asserts that the California Supreme Court frequently refers to a provision of the United States Constitution for convenience although it intends to base its ruling on the California constitutional counterpart guarantee as well. This assertion is based on *People v. Cook* (1978) 22 Cal.3d 67, 81, fn. 4 [148 Cal. Rptr. 605, _____ P2d _____.], where the California Supreme Court stated:

> "In *Theodor* [Theodor v. Superior Court (1972) 8 Cal.3d 77 (104 Cal. Rptr. 226, 501 P.2d 234)] the phrase 'Fourth Amendment' was used for convenience to refer to both the Fourth Amendment to the United States Constitution and the similar provision of article 1, section 13, of the California Constitution. (See, e.g., *People v. Triggs* (1973) 8 Cal.3d 884, 891-892, fn. 5 [106 Cal. Rptr. 408, 506 P.2d 232].) As will

[2]In *Department of Mental Hygiene of California v. Kirchner, supra,* (1965) 380 U.S. 194, at 198-200, the California Supreme Court opinion indicated that a prior case, which had been based on federal constitutional provisions, was dispositive, but proceeded to cite additional cases which were based on both state and federal constitutional provisions.

In *State of Minnesota v. National Tea Company, supra,* (1940) 309 U.S. 551, reference had been made below to cases dealing with both state and federal constitutions. Moreover, the state court had framed the issue as a question involving both federal and state constitutional provisions.

> appear, the decision herein is based solely on the latter provision."

It should be noted, however, that while there are references in *Theodor, supra,* to the Fourth Amendment, the court in that opinion decided the issue before it on statutory grounds and expressly declined to reach any federal or state constitutional issue. (*Theodor v. Superior Court, supra*, at 90.) Since there was no express interpretation in *Theodor* of either the Fourth Amendment to the United States Constitution or its California constitutional counterpart (article 1, section 13) the reference to *Theodor* in *People v. Cook, supra,* may not be interpreted as indicating that any citation by a California court of federal constitutional provision creates an ambiguity as to whether reference is also made to a similar provision in the California Constitution.

It is true that in *People v. Triggs, supra,* (1973) 8 Cal.3d 884, 891-892, fn. 5, the California Supreme Court noted that the court often referred to both state and federal constitutional protections against unreasonable searches and seizures under the rubric of "Fourth Amendment" rights. However, the court in *Triggs, supra,* expressly stated that its ruling was based on its own determination of the proper construction of article 1, section 19 of the California Constitution. Respondent has cited no case where, in the absence of ambiguous language in the original opinion, an opinion was held in a later opinion to have been based independently on both state and federal constitutional authority. Petitioner submits, moreover, that the California courts have not stated that citations to the "Fifth Amendment" for convenience also include reference to similar California constitutional provisions. In *People v. Pettingill* (1978) 21 Cal.3d 231, 251 [145 Cal. Rptr. 861, 578 P.2d 108], the California high court

declined to follow this Court's ruling in *Michigan v. Mosley* (1975) 423 U.S. 96, but rather adopted its prior holding in *People v. Fioritto* (1968) 68 Cal.2d 714 [68 Cal. Rptr. 817, 441 P.2d 625], and determined on independent state grounds that the California Constitution precluded admission of evidence obtained after invocation of *Miranda* rights even where the suspect subsequently waived his rights. In his dissent in *Pettingill, supra,* at pages 252-253, Justice Clark pointed out the fact that the *Fioritto* opinion was based on the California court's interpretation of *Miranda* as an interpretation of the Fifth Amendment to the United States Constitution, and that *Fioritto* made no mention of the California Constitution. Notwithstanding this criticism, the majority in *Pettingill* declined to state that the references in *Fioritto* to the "Fifth Amendment" was a convenient means to refer to both federal and state constitutional provisions. Nor did the court indicate in retrospect that *Fioritto* was based on the California Constitution.[3]

Petitioner submits that the instant matter should not be remanded without some language within the four corners of the state opinion indicating at least some ambiguity as to its constitutional or statutory basis. The opinion in the instant case is remarkable for its lack of ambiguity in this regard. Accordingly, petitioner submits that the matter is properly before this Court for review.

III.

THE RECORD BELOW DOES NOT SUPPORT RESPONDENT'S CONTENTION THAT THE INSTANT DECISION CAN BE SUSTAINED ON GROUNDS OTHER THAN WHETHER A REQUEST FOR A PROBATION OFFICER IS AN INVOCATION OF THE FIFTH AMENDMENT

Respondent contends that the instant decision of the California Supreme Court can be sustained on other

[3]It should be noted that the citation to *People v. Fioritto* in *In re Michael C.*, herein (Petn. App. A, p. 22) is solely to that portion of the opinion establishing the refusal to sign a waiver of his constitutional rights as an invocation of his privilege (*People v. Fioritto, supra,* 68 Cal.2d 714, 719) and not a citation to that portion of the opinion adopted on independent state grounds in *People v. Pettingill, supra*.

grounds than whether a request for a probation officer is per se an invocation of the right to silence. Respondent argues that some of his statements during interrogation could be interpreted as a direct invocation of his Fifth Amendment rights and he argues that his confession was induced by "threats" and "promises." Petitioner submits that this contention does not justify denial of a writ of certiorari in the instant case.

As respondent concedes, the decision of the California Supreme Court below was based solely on the request for a probation officer during custodial interrogation. (Petn., App. A.) The California Court of Appeal, when affirming the judgment, considered this other contention in light of the record and concluded that respondent did not invoke his right to silence nor was his confession the product of any threats or promises. Having determined that the trial court's factual findings were supported by the record, the Court of Appeal decided the issue in favor of the People. (Petn., App. B., p. 38; see *People v. Duren*, 9 Cal.3d 218, 238 [107 Cal. Rptr. 157, 507 P.2d 1365] in California, a trial court's findings respecting the voluntariness of a confession are binding on appeal if supported by substantial evidence in the record).)

The transcript of the tape-recorded interview of respondent which is challenged here included the following:

> "Q. No, look, you can tell us what you did, like the fact that you drove up there; right?
>
> A. Yeah.
>
> Q. Okay, tell us about what you did.
>
> A. Nothing, just heard the shot and (Unintelligible) . . .
>
> Q. Okay, now before, what was you going to that area for? *[sic]*

A. You never know until you get into it, like you said.

Q. Well, that's right, you know (Unintelligble *[sic]*) . . . . you were out there just burglarizing or what?

A. (Unintelligible) . . . just driving around town.

Q. Okay.

A. Hey, man (Unintelligible) . . . tell nobody what I've been telling you, man.

Q. (Unintelligible) . . . no way. No way (Unintelligible) . . .

A. (Unintelligible) . . .

Q. (Unintelligible) . . . Jerry will come in just a minute (Unintelligible) . . . He'll let us out. I told Jerry (Unintelligible) . . . I wanted my coffee, so he'll be in here in just a minute. Jerry, I want my coffee. Okay, but anyway, tell us what you were just driving around the area for that night.

A. Yeah.

Q. And so you know what street it happened on, don't you?

A. No.

Q. You aren't familiar with the area? Were you over to your sister's house (Unintelligible) . . . real close to your sister's house; right?

A. I wasn't over there, no.

Q. Oh, got our coffee (Unintelligible) . . . no, not yet. I'll go get it (Unintelligible) . . . Okay,

just a minute. Okay, Michael, let me say something to you. You got a good chance that you can come out of this thing pretty good.

A. (Unintelligible) . . . bullshit, man.

Q. But don't screw yourself up, because you knwo *[sic]* what's going to happen. You know and I know. You know why we got all of you in here.

A. Yeah.

Q. Somebody is going to tell us what happened and the one who tells us what happened is the one that's not going to get hassled.

A. Well, man, put it like this (Unintelligible) . . . take your word for that because, see, I know I've been that there situation, what you just told me. They say that to just get you to cop out and then they'll back whatever you want to call it. They'll fuck you (Unintelligible) . . . just to hear you talking (Unintelligible) . . .

Q. Micke *[sic]* (Unintelligible) . . . coffee here (Unintelligible) . . . they are going to bring it into the office. You want a sip? Do you like coffee (Unintelligible) . . . Tell me, Mike, when you were driving around that night (Unintelligible) . . . had the gun, right? What kind of gun is it?

A. Thirty-two." (S.T. pp. 14-16.)[4]

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[4]"S.T." refers to "Statement Transcript" admitted as Petitioner's Exhibit 18 in the trial court and which was included as part of the record before the California Supreme Court.

While it is true that when the interrogating officer stated, "Somebody is going to tell us what happened and the one who tells us what happened is the one that's not going to get hasseled" he may have implied that respondent might benefit by cooperating, respondent's answer to the comment belies any inference that respondent was tricked or coerced into a confession. In *Miranda*, this Court stated "Moreover, any evidence that the accused was threatened, tricked, or cajoled into a waiver [of his rights], will of course, show that defendant did not voluntarily waive his privilege." (*Miranda v. Arizona, supra,* (1966) 384 U.S. 436, 476.) In the instant case, respondent had already waived his rights under *Miranda* before the challenged statement of the probation officer was made. Furthermore, respondent's reply of disbelief amply supports the implicit finding of the trier of fact that respondent's confession was not the result of any trickery.

In *United States v. Washington* (1977) 431 U.S. 181, 187-188, this Court stated:

> "The Constitution does not prohibit every element which influences a criminal suspect to make incriminating admissions. See *Garner v. United States*, 424 U.S. 648 (1976), *Beckwith v. United States*, 425 U.S. 341 (1976), *Schneckloth v. Bustamonte*, 412 U.S. 218, 223-227 (1973) . . . . The constitutional guarantee is only that the witness be not *compelled* to give self-incriminating testimony. The test is whether, considering the totality of the circumstances, the free will of the witness was overborne. *Rogers v. Richmond*, 365 U.S. 534, 544, (1961)."

In the present case the trial court implicitly found on the basis of substantial evidence that the free will of respondent had not been overborne by the police.

Clearly, an appellate court is not in the same position as a trial court to determine whether a statement is voluntary. The trial court may view the witnesses' demeanor, assess the suspect's age and maturity, and view the totality of circumstances surrounding the interrogation. Petitioner submits that implicit in the California Supreme Court's decision is the concept that these factual questions were resolved adversely to respondent below. The California Supreme Court's decision was based solely on the question of law raised in the petitions filed with that court.

The decision below extends the *Miranda* exclusionary rule and is based on federal constitutional authority. Respondent's contention that the decision could have been based on other grounds is of little importance to the instant petition for a writ of certiorari. The fact is that the trial and appellate courts of California have not made the factual findings necessary to support respondent's position. Moreover, the more important fact is that California has fashioned a federal constitutional rule which, unless overturned by this Court, will serve as an important precedent in future cases. That rule is contrary to the decisions of this Court and will severely hamper the proper investigative role of law enforcement. The decision of the California Supreme Court is thus properly the subject of review by way of a writ of certiorari.

CONCLUSION

For the foregoing reasons petitioner submits that a writ of certiorari should issue to review the decision of the California Supreme Court.

Respectfully submitted,

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